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No. 47

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

SAM GINSBERG,

Appellant,

against

THE STATE OF NEW YORK,

Appellee.

PETITION FOR REHEARING AND FOR CLARIFICATION OF THE OPINION OF THE COURT

EMANUEL REDFIELD,
Counsel for Appellant,
Office & P. O. Address,
37 Wall Street,
New York, New York 10005.
212 HAnover 2-1023

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Appellant, Sam Ginsberg, prays that this court grant a rehearing of its judgment dated April 22, 1968, which affirmed the judgment of conviction of the appellant.

(1)

The opinion, first page, states that no attack was made by the appellant upon the statute as applied. Evidently, because the appellant's emphasis upon the need of a ruling on the statute upon its face (Brief for the Appellant, pages 6-7, under Summary of Argument, item "1"), and on the oral argument, the opinion overlooks the fact that the appellant challenged the finding that the books are harmful as to minors.

On page 8 of Brief for the Appellant the question was urged as follows:

> "3. The magazines in question are not obscene by this court's own decisions. The only *charge* against

> Ginsberg is that they contain nudes, in that the female breast is fully exposed. The trial court held that this alone fulfilled all the elements of the crime. We urge that the magazines are not harmful to minors within the tests set forth in the statute."

Again, at page 20 of the Brief:

> "Nor is the literature in this case of that kind: 'Sir' was upheld by this court in *Gent* v. *Arkansas, supra,* and the other three publications are of the same character. They clearly are not of the kind 'directed' to the age class of the statute."

At the oral argument some of the justices participated in discussion with counsel as to how it can be demonstrated that the magazines in question can be the basis for a prosecution, since they were not condemnable under *Gent* v. *Arkansas;* where "Sir" was specifically passed upon (see also, Brief for the Appellant, page 11, second paragraph).

The questions presented included every question fairly comprised therein, Rule 15(c); Rule 40(d)(1)(2); also the opinion of Justice Fortas in this case.

A rehearing and resolution of the question would save future efforts on that issue, it would provide guidance now and reduce the jeopardy that postponement of decision would produce.

(2)

The court failed to pass upon a serious point raised by appellant with respect to the validity of the statute on its face. It was urged, Brief for the Appellant, page 20, that the statute failed to limit itself to material that was

designed or directed at persons under the age fixed by the statute.

We contended that this was a most important point, for otherwise, the effect of the statute would operate to restore the *Hicklin* rule. This court in the *Mishkin* case, recognized the distinction. This point was also made by Lockhart and McClure, the authors of the "variable" doctrine, 45 Minn. Law Review, 5, 84.

Even the State of New York has recognized the importance of the distinction for it amended the statute, in effect September 1, 1967 (see text in footnote on page 20 of Brief for the Appellant) that the predominant appeal shall be judged by its effect upon adults unless it appears the character of the material or the circumstances of its dissemination *was designed* for children.

Although the statute attacked in this case omitted this important factor, despite the appellant's emphasis of it, the court evidently did not pass upon it. This omission warrants a rehearing and amendment of the opinion.

(3)

Although the appellant conceded in his brief and oral argument that the welfare of children (as well as the welfare of adults) is a subject of a state's constitutional power, he urged that in the case of the First Amendment, the state has no power to prescribe literature based on age. The court has repeatedly made the distinction (for one example, in *Smith* v. *California*) that there is a distinction between matters of the mind, literature, and other matters. That distinction supported appellant's appeal. Otherwise, he might just as well not have presented the argument, for he too recognized that *Prince* v. *Massachusetts* and even the common law, have long recognized that children fall into a special class. But *Prince* was not a First Amendment case.

The opinion does not answer this question. What it states is that if a state believés certain material to be harmful to children, it may legislate. We submit, that the constitutional problem posed, has not been answered.

Once it is admitted as a principle, without qualification, as does the court, that legislation may issue against literature because a legislature deems the literature harmful, the logical sequence is that laws may also be enacted against *any* literature the legislature deems harmful. The principle would not be confined to sex-oriented material, but would apply to any claimed harm, such as literature containing violence, crime, brutality or even fantasy.

We respectfully submit that at least in this respect, if rehearing is not granted, the opinion should be clarified. The unqualified language of the opinion is *in terrorem,* if not suggestive for subsequent legislation.

Moreover, the philosophical ground given to support the constitutionality of the law, to wit, that it aids parents in rearing their children, cannot be squared with First Amendment protections to expression, nor does it comport with realities. First, as to constitutional concepts: The same doctrine could apply to any literature; therefore, the argument could logically run that because it is an aid to parents, any literature could be the subject to control by legislation. This is clearly obnoxious to the First Amendment. Secondly, the doctrine that the statute assists parents is a fiction. The statute does not provide for parent enforcement. Indeed, the genesis of such statutes is not parent-inspired, but rather minority group-pressured. In operation, such a statute is enforced by the constable. The constable does not await a request from parents to prosecute. His duty is to enforce the law; and attempts by parents to withhold prosecution could be met with a charge that such parents are compounding a crime. This points up the error in the suggestion that the law is an aid to parents. In stating this, we are of course assum-

ing that "the aid to parent" is a valid ground to support a restraint upon distribution of literature. We have pointed out, however, that the assumption itself is repugnant to the Constitution because it gives rise to alien doctrine,—that parents by legislative fiat containing punishment to a dealer of one-year imprisonment, may control the distribution of literature of any type, including the type in this case.

(4)

A crucial argument of the appellant was the pragmatic one, akin to *Smith* v. *California,* that the tremendous risk placed on a retailer of ascertaining at his peril, whether the material is permissible for adults only would result in a retailer refusing to handle even those passable for adults; it would thus be intimidating and result in censorship. The practical effect of such censorship would return publishers and distributors back to the days before *Roth*—back to the days of *Hicklin.* Because the inevitable operation of the statute would create a standard that would be measured by the effect of the reading matter on children, *Butler* v. *Michigan,* for practical purposes, would thus be overruled.

Lockhart and McClure, *op. cit.* page 86, recognized this, and believed that because of the practical effect of the "variable" doctrine on book distribution, this court would hold a statute, of the type here involved, unconstitutional. Although appellant urged this in his Brief, pages 18-20, the court ignored the contention. And although Lockhart and McClure are cited in the opinion of the court for other propositions, they have been ignored in connection with this argument of appellant, although they are specifically cited.

We submit that this omission warrants a rehearing.

We respectfully submit that the opinion does not answer the contentions as to vagueness which the appellant made in his brief, pages 24-27. The opinion does not come to grips with the serious problem presented by the appellant and the *amici*. The statute does not provide a distributor with a method to discern what material, permissible for adults, is nevertheless harmful for minors. Undoubtedly, it is this lack of clarity which prompted questions from the court at the oral argument, as to how it can be determined (in the light of the statute), that the magazines in this case are not entitled to the benefit of *Redrup*.

The disposition of the vagueness contention on the ground that the scienter requirements have been fulfilled, still deprives a vendor of a need for clarity as to what he may not sell. He is still left with the hazard of selling a classic containing pictures of nudes or of selling the material in *Redrup*.

Without clarification of this important phase, it can be predicted that the courts will be flooded with appeals. If there has been chaos in the cases of adult reading (see opinion of Justice Harlan, concurring) one need not be a prophet to foresee the multiplied difficulties created by a vague statute such as the present one, which gives no clear standard method or criteria for one to be able to make a distinction between literature that is passable for adults, but harmful to children. It is guess-work at best for counsel, the courts and the publishing world. One cannot lightly dismiss the difficulties involved to the publishers and distributors. They live in a world where decisions have to be made. This perilous statute furnishes no guidance to them, other than to intimidate them.

EMANUEL REDFIELD, counsel for the appellant, hereby certifies that the foregoing petition is presented in good faith and not for delay.

Dated: May 14, 1968.

Respectfully submitted,

EMANUEL REDFIELD,
Counsel for Appellant,
37 Wall Street,
New York, New York 10005.

On the Petition:
EMANUEL REDFIELD,
WILLIAM K. FRIEDMAN,
BENJAMIN E. WINSTON.